

Supreme Court, U. S.

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IN THE

**Supreme Court of the United States**

OCTOBER, 1978

No. 78-179

ROBERT L. JOHNSON, JR., *et al.*,

*Petitioners,*

v.

RYDER TRUCK LINES, INC., *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FOURTH CIRCUIT

**REPLY BRIEF IN SUPPORT OF CERTIORARI**

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**REPLY BRIEF IN SUPPORT OF CERTIORARI**

Subsequent to the filing of the petition in this case, a decision of the Fifth Circuit was published<sup>1</sup> which expressly recognized the conflict among the circuits regarding the application of section 1981 to seniority systems. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978). The court of appeals there noted:

Appellants maintain that Teamsters does not affect our prior holding to the extent that it was grounded in 42 U.S.C. § 1981. Two of our sister circuits have recently split on this issue, the Fourth Circuit holding that bona fide seniority systems which are protected by section 703 (h) of Title VII are not violative of section 1981, and the Third Circuit reaching a contrary conclusion that section 703 (h) does not affect the remedial

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<sup>1</sup> The opinion is dated July 24, 1978, and appears in the Federal Reporter, 2d advance sheet dated August 7, 1978. The petition in this case was filed on August 2, 1978.

powers of the federal courts under section 1981. *Johnson v. Ryder Truck Lines, Inc.* . . . ; *Bolden v. Pennsylvania State Police* . . . 576 F.2d at 1191, n. 37.

Since the Fifth Circuit had earlier held that section 1981 forbade the use of seniority systems that perpetuate past discrimination,<sup>2</sup> the issue in *Pettway* was whether Congress in enacting Title VII intended to repeal section 1981 insofar as section 1981 provided a greater remedy than Title VII itself. The Fifth Circuit concluded that such a repeal had been intended:

Assuming, as we must, that Congress intended section 703 (h) to accord absolute protection to pre-Act seniority rights which accrued under bona fide seniority systems, Congress could not have intended such seniority rights to remain subject to revision under section 1981. 576 F.2d at 1192, n.37.

This view that Title VII establishes the exclusive standard in employment discrimination cases is similar to that of the majority opinion in the instant case, but is entirely inconsistent with *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).

Respondents suggest that any possible resolution of *County of Los Angeles v. Davis*, No. 77-1553, will be favorable to them, urging that the Court must either hold that section 1981 requires proof of discriminatory intent or that there is "no operational distinction" between the liability standards under section 1981 and Title VII.<sup>3</sup> If *County of Los Angeles* holds that section 1981 requires proof of intent, that would not dispose of the instant case, for inten-

<sup>2</sup> Petition, p. 9.

<sup>3</sup> Brief for respondent Ryder Truck Lines, pp. 7-8; Brief for Respondent Unions, pp. 12-13.

tional discrimination in hiring and assignment was found by both the district court and the court of appeals. Notwithstanding *Washington v. Davis*, 426 U.S. 229 (1976), even in a constitutional case such initial intentional discrimination is sufficient to render unlawful neutrally motivated practices which perpetuate the effect of past discrimination. A possible alternative disposition of *County of Los Angeles*, indeed the position pressed by the petitioner in that action,<sup>4</sup> would be a holding that the substantive prohibitions of Title VII do not affect the proper construction of section 1981; such a holding would require reversal of the decision of the Fourth Circuit in the instant case.

For the above reasons a Writ of Certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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<sup>4</sup> Brief for Petitioner, No. 77-1553, pp. 14-18, 39-46.